United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING

Court's copy

75-7677, 7681

United States Court of Appeals

FOR THE SECOND CIRCUIT

RANDOLPH PHILLIPS,

Plaintiff-Appellee,

v.

JOHN E. TOBIN, FRED M. KIRBY, ALLAN P. KIRBY, JR., each in their own capacity as directors of Alleghany Corporation, and as attorneys for and guardians of the property of Allan P. Kirby, Sr., JOHN J. BURNS, JR.,

Defendants-Appellants.

RALPH K. GOTTSHALL, RICHARD R. HOUGH, WILLIAM G. RABE, CLIFFORD H. RAMSDELL, and CARLOS J. ROUTH, as directors of Alleghany Corporation,

Defendants,

and ALLEGHANY CORPORATION,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION FOR REHEARING

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PETITION FOR REHEARING

NOW COMES Randolph Phillips, plaintiff-appellee herein, and pursuant to Rule 40 of the Federal Rules of Appellate Procedure, respectfully petitions this Honorable Court for a rehearing of the appeal and argument herein as decided by its Opinion and Judgment filed herein on December 16, 1976. In support thereof, petitioner states the following points of law or fact which "the Court has overlooked or misapprehended."

I.

THE COURT HAS OVERLOOKED THAT THE STOCKHOLDERS DERIVATIVE SUIT "IS BASED UPON TWO DISTINCT WRONGS: THE ACT WHEREBY CORPORATION WAS CAUSED TO SUFFER DAMAGE, AND ACT OF CORPORATION ITSELF IN REFUSING TO REDRESS SUCH ACT." (Black's Law Dictionary, 4th ed., p. 1588, * citing Druckerman v. Harbord, 174 Misc. 1077, 22 N.Y.S.2d 595.) This Court has only considered the first wrong.

Thus this Court's Opinion is incorrect in stating this is "a suit belonging to the corporation." Opinion, 6090-6094). It is only theoretically true insofar as the first stated wrong is concerned. It has no validity with respect to the second stated wrong, which is a wrong against plaintiff as a stockholder. The suit in this respect is an action upon a "liability or obligation" incurred by the corporation and owing to the stockholder plaintiff. Thorne v. Brand, 277 N.Y. 212, 213. It is thus in part plaintiff's "own case".

* **STOCKHOLDER'S DERIVATIVE SUIT.** An equity proceeding by a stockholder for purpose of sustaining in his own name a right of action existing in corporation itself, where corporation would be an appropriate plaintiff. Felsenheld v. Bloch Bros. Tobacco Co., 119 W.Va. 167, 192 S.E. 545, 546, 123 A.L.R. 331. It is based upon two distinct wrongs: The act whereby corporation was caused to suffer damage, and act of corporation itself in refusing to redress such act. Druckerman v. Harbord, 174 Misc. 1077, 22 N.Y.S.2d 595, 597.

As stated in Druckerman:

> "A stockholders' derivative action is based on two distinct wrongs; (1) The act whereby the corpora- was caused to suffer damages, and (2) the act of the corporation itself in refusing to redress the said act. The second of these wrongs, it has been squarely held, constitutes a liability or obligation within the meaning of Section 216 of the General Corporation Law. Thorns v. Brand, 277 N. Y. 212, 213, 14 N. E. 2d 42." (p. 591)

This ruling of the New York Court of Appeals undermines the foundation of this Court's Opinion, which is confined solely to consideration of the corporation's claim or the wrong against the corporation and does not consider the corporation's wrong against the plaintiff shareholder. The Opinion thus stands on one leg instead of two.

II.

TO THE EXTENT THAT THIS SUIT IS AN ACTION TO ENFORCE THE CORPORATION'S "LIABILITY OR OBLIGATION" TO PLAINTIFF STOCKHOLDER IT CLEARLY IS HIS "OWN CASE" (Opinion 6090) WITHIN THE MEANING OF 28 U. S. C. s 1654) AND IS NOT "A SUIT BELONGING TO THE CORPORATION". (Opinion 6090)

The Corporation here is represented by a licensed attorney, representing it as defendant. This fact was not true in any case cited by this Court's Opinion, in which pro se representation was denied. Yet the Opinion uses these cases as its sole authority for stripping plaintiff of the right to act as his own counsel.

III.

THIS COURT'S OPINION HAS OVERLOOKED THAT "THE PARTIES", AS USED IN 28 U.S.C. s 1654, 'mean...the real beneficial owners of the claims asserted in the suit" HEISKELL v. MOZIE, (D.C.Cir.), 82 F.2d at 863, AND THAT "STOCKHOLDERS ARE THE EQUITABLE OWNERS OF THE PROPERTY AND ASSETS OF THE CORPORATION." FLETCHER, CYCLOPEDIA OF CORPORATIONS, Vol. II, s 5100. It is this which provides "that element of personal interest which alone permits the management of an action at law in a court by someone other than an attorney at law." Heiskell, supra, at863.

Thus this is not "a suit belonging to the corporation" any more than stock held of record in a broker's name is the basis of a suit belonging to the broker. The corporation holds its assets for the benefit of its stockholders, and this is what entitles the shareholder to bring a derivative action when the corporation fails in its duty to protectn them by enforcing its claims. Druckerman, supra; Thorne v. Brand, supra.

As indicated by Fletcher, supra, the stockholder is the ultimate owner of the corporation's asset. To say that a suit to protect them is one "belonging to the corporation" is only true if the corporation acts to protect them; when it defaults in enforcing its claim it is the shareholder who is injured and thus under Heiskell and Fletcher it is by long-established principles of law the derivative suit of the shareholder.

IV.

THIS CANNOT BE "A SUIT BELONGING TO THE CORPORATION" (OPINION, p. 6090) EXCEPT AS CUSTODIAN OF THE DERIVATIVE CLAIM, SINCE THE CORPORATION BELONGS TO PLAINTIFF SHAREHOLDER AND THE OTHER SHAREHOLDERS.

The failure of Judge Bartels' Opinion to consider thia basic aspect of legal and corporate reality merits rehearing.

V.

THIS COURT'S CONCLUSION THAT "SINCE A CORPORATION MAY NOT APPEAR EXCEPT THROUGH AN ATTORNEY, LIKEWISE THE REPRESENTATIVE STOCKHOLDER CANNOT APPEAR WITHOUT AN ATTORNEY" (OPINION, p. 6090) is BASED ON THE PRIOR CONCLUSION THAT THIS IS "A SUIT BELONGING TO THE CORPORATION" AND IS ERRONEOUS FOR FAILURE TO CONSIDER THE FACT THAT THE REPRESENTATIVE PLAINTIFF AND FELLOW SHAREHOLDERS OWN THE CORPORATION.

We have been unable to find any authority overruling the rule stated in Heiskell, supra, or in Fletcher, supra.

VI.

THIS COURT IN ITS OPINION HAS "WON THE GAME BY SWEEPING ALL THE CHESSMEN (OF PLAINTIFF) OFF THE TABLE."

In his Spirit of Liberty in which he speaks of Mr. Justice Cardozo, Learned Hand stated:

> "He never disguised the difficulties, as ... judges do who win the game by sweeping all the chessmen off the table: like John Stuart Mill, he would often begin by stating the other side better than its advocate had stated it." (Knopf, 1960), p. 131.

VII.

IF THIS COURT REJECTS THE ARGUMENT MADE HEREIN, WE RESPECTFULLY SUGGEST THAT JUDICIAL STATESMANSHIP WOULD LEAD IT TO MODIFY ITS OPINION OF DECEMBER 16,1976 SO AS TO LET PLAINTIFF REPRESENT HIS OWN SHARES.

In this context, to require appointment of a licensed attorney to represent the other shareholders would eliminate the serious Constitutional and statutory issues present in this case and which otherwise only the Supreme Court could resolve.

CONCLUSION

The Petition for Rehearing should be granted, and upon rehearing the decision of the court below should be affirmed, or modified by requiring the appointment of a licensed attorney to represent the shareholders of Alleghany Corporation other than plaintiff.

Respectfully submitted by

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December 29,1976

CERTIFICATE OF SERVICE

I hereby certify that I have today served a copy of plaintiff's (1) Petition for Rehearing herein and (2) a copy of plaintiff's Opposition to Taxation of Costs upon counsel for the appellants herein by mailing same in an envelope securely sealed with first class postage attached and addressed to them at their offices of record herein.

RANDOLPH PHILLIPS

December 30, 1976